

Nos. 10-56971 & 11-16255

**United States Court of Appeals
for the Ninth Circuit**

EDWARD PERUTA; MICHELE LAXSON; JAMES DODD;
LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA
RIFLE & PISTOL ASSOCIATION FOUNDATION,

Plaintiffs-Appellants,

v.

COUNTY OF SAN DIEGO; WILLIAM GORE,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA
No. 3:09-cv-02371-

BRIEF FOR *AMICI CURIAE*
NEW YORK STATE RIFLE & PISTOL ASSOCIATION,
ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS,
COMMONWEALTH SECOND AMENDMENT,
GUN OWNERS' ACTION LEAGUE, AND
MARYLAND STATE RIFLE & PISTOL ASSOCIATION
IN SUPPORT OF PLAINTIFFS-APPELLANTS

David D. Jensen
DAVID JENSEN PLLC
111 John Street, Suite 420
New York, New York 10038
(212) 380-6615 tel
(917) 591-1318 fax
david@djensenpllc.com
Attorney for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

New York State Rifle & Pistol Association, Inc. has no parent corporation, and no publicly held corporation owns its stock.

Association of New Jersey Rifle & Pistol Clubs, Inc. has no parent corporation, and no publicly held corporation owns its stock.

Commonwealth Second Amendment, Inc. has no parent corporation, and no publicly held corporation owns its stock.

Gun Owners' Action League has no parent corporation, and no publicly held corporation owns its stock.

Maryland State Rifle & Pistol Association, Inc. has no parent corporation, and no publicly held corporation owns its stock.

TABLE OF CONTENTS

IDENTITY AND INTEREST OF THE AMICI	1
ARGUMENT	4
I) The History of Discretionary Licensing Laws	5
A. Nineteenth Century	5
B. Twentieth Century	7
II) Current Implementation	11
A. Nationwide.....	11
B. Hawaii: Virtual Ban	13
C. Some Jurisdictions are Very Restrictive	13
D. Other Localities Have an <i>Ad Hoc</i> Range of Practices.....	18
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<u>Bando v. Sullivan</u> , 735 N.Y.S.2d 660, 290 A.D.2d 691 (App. Div. 2002)	17
<u>Commonwealth v. Seay</u> 383 N.E.2d 828, 376 Mass. 735 (1978).....	8
<u>District of Columbia v. Heller</u> , 554 U.S. 570 (2008)	11
<u>Drake v. Filko</u> , 724 F.3d 426 (3d Cir. 2013)	24
<u>In re Bastiani</u> , 881 N.Y.S.2d 591, 23 Misc. 3d 235 (County Ct., Rockland Co. 2008).....	17
<u>In re Borinsky</u> , 830 A.2d 507, 363 N.J. Super. 10 (App. Div. 2003).....	14
<u>In re McIntyre</u> , 552 A.2d 500 (Del. Super. Ct. 1988)	12
<u>In re O'Connor</u> , 585 N.Y.S.2d 1000, 154 Misc. 2d 694 (County Ct., Westchester Co. 1992) <u>aff'd sub nom.</u> , <u>O'Connor v. Scarpino</u> , 638 N.E.2d 950, 83 N.Y.2d 919 (1994)	17
<u>In re Preis</u> , 573 A.2d 148, 118 N.J. 564 (1990).....	14
<u>Klenosky v. N.Y. City Police Dep't</u> , 428 N.Y.S.2d 256, 75 A.D.2d 793 (App. Div. 1980), <u>aff'd without op.</u> 421 N.E.2d 503, 53 N.Y.2d 685 (1981).....	16
<u>Moore v. Gallup</u> , 45 N.Y.S.2d 63, 267 A.D. 64 (App. Div. 1943), <u>aff'd without op.</u> 59 N.E.2d 439, 239 N.Y. 846 (1944)	16
<u>Mosby v. Devine</u> , 851 A.2d 1031 (R.I. 2004).....	12
<u>O'Brien v. Keegan</u> , 663 N.E.2d 316, 87 N.Y.2d 436 (1996)	15, 19
<u>O'Connor v. Scarpino</u> , 638 N.E.2d 950, 83 N.Y.2d 919 (1994)	19
<u>Palmer v. District of Columbia</u> , no. 1:09-CV-1482, 2014 U.S. Dist. LEXIS 101945 (D.D.C. Jul. 24, 2014)	11
<u>Ruggiero v. Police Commissioner of Boston</u> , 464 N.E.2d 104, 18 Mass. App. Ct. 256 (App. Ct. 1984).....	19

<u>Scherr v. Handgun Permit Review Bd.</u> , 880 A.2d 1137, 163 Md. App. 417 (Ct. Spec. App. 2005)	18
<u>Smith v. State</u> , 308 A.2d 442, 18 Md. App. 612 (Ct. Spec. App. 1973)	10
<u>Snowden v. Handgun Permit Review Bd.</u> , 413 A.2d 295, 45 Md. App. 464 (Ct. Spec. App. 1980)	18
<u>State v. Gratz</u> , 92 A. 88, 86 N.J.L. 482 (1914).....	9
<u>State v. Hock</u> , 257 A.2d 699, 54 N.J. 526 (1969).....	10
<u>State v. Nieto</u> , 130 N.E. 663, 101 Ohio St. 409 (1920).....	6
<u>Watson v. Stone</u> , 4 So. 2d 700, 148 Fla. 516 (1941)	7
<u>Woollard v. Sheridan</u> , 863 F. Supp. 2d 462 (D. Md. 2012), <u>rev'd</u> <u>sub nom. Wollard v. Gallagher</u> , 712 F.3d 865 (4th Cir. 2013).....	24

STATUTES & REGULATIONS

Cal. Penal Code § 26150.....	11
Conn. Gen. Stat. § 29-28	12
Conn. Gen. Stat. § 29-32b	12
2014 D.C. Act 447, § 2	10
2014 D.C. Act 926, § 2	11
D.C. Code § 22-4506 (repealed 2009).....	11
11 Del. Code Ann. § 1441	11
1927 Haw. Sess. Laws 209-10, § 5	10
1927 Haw. Sess. Laws 209-10, § 7	10
Haw. Rev. Stat. § 134-9.....	11, 13
1972 Md. Laws ch. 13, § 3	10
Md. Code Ann., Pub. Safety § 5-306	11
Md. Code Regs. 29.03.02.03	18

1906 Mass. Acts ch. 172, § 2.....	8
1906 Mass. Acts. ch. 172, § 1.....	7
1998 Mass. Acts ch. 180, § 29.....	8
1998 Mass. Acts ch. 180, § 41.....	19
Mass. Gen. Laws ch. 140, § 121	19
Mass. Gen. Laws ch. 140, § 131	7, 11
1922 N.J. Acts ch. 138, § 1	9
1924 N.J. Acts ch. 137, § 2	9
1966 N.J. Laws ch. 60, sec. 32	10
N.J. Stat. Ann. § 2C:39-6.....	15
N.J. Stat. Ann. § 2C:58-4.....	11, 15
N.J. Admin. Code § 13:54-2.3.....	14
1911 N.Y. Laws ch. 195, sec. 1	8
1913 N.Y. Laws ch. 608, sec. 1	8
N.Y. Penal Law § 265.00	21
N.Y. Penal Law § 400.00	8, 11, 15
R.I. Gen. Laws § 11-47-11	12
R.I. Gen. Laws § 11-47-18	12
N.Y. City R. tit. 38, § 5-03	16-17

OTHER AUTHORITIES

Clayton E. Cramer, <u>The Racist Roots of Gun Control</u> , 4 Kan. J. L. & Pub. Pol. 17 (1995).....	5-6
David B. Kopel, <u>The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?</u> (1992).....	9

David D. Jensen, <u>The Sullivan Law at 100: A Century of “Proper Cause” Licensing in New York State</u> , 14 NYSBA Gov., L. & Pol’y J. 6 (2012)	22
Department of the Attorney General, <u>Firearms Registrations in Hawaii, 2010</u> (2011).....	14
Department of the Attorney General, <u>Firearms Registrations in Hawaii, 2011</u> (2012).....	14
Department of the Attorney General, <u>Firearms Registrations in Hawaii, 2012</u> (2013).....	13
Department of the Attorney General, <u>Firearms Registrations in Hawaii, 2013</u> (2014).....	13
Department of the Attorney General, <u>Firearms Registrations in Hawaii, 2014</u> (2015).....	13
Robert J. Cottrol and Raymond T. Diamond, <u>“Never Intended to Be Applied to the White Population”: Firearms Regulation and Racial Disparity—the Redeemed South’s Legacy to a National Jurisprudence?</u> , 70 Chi.-Kent L. Rev. 1307 (1995).....	6, 9
Sandra Peddie, <u>Nassau gun permits were improperly issued in some cases</u> , Newsday (Apr. 5, 2014)	16
Sewell Chan, <u>Annie Hall, Get Your Gun</u> , N.Y. Times (Dec. 2, 2008).....	17
Stephen P. Halbrook, <u>Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms</u> (2010).....	5-6
Supplemental Brief, <u>Drake v. Filko</u> , No. 12-1150 (3d Cir. Apr. 29, 2013)	15
U.S. Gen. Accounting Office, <u>States’ Laws and Requirements for Concealed Carry Permits Vary Across Nation</u> (2012).....	<i>passim</i>
Age and Sex Composition, http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf (last visited Apr. 29, 2015)	15

Apportionment Data, http://www.census.gov/2010census/data/apportionment-data.php (last visited Apr. 29, 2015)	13
Licensing Town-by-Town 2015, http://www.comm2a.org/index.php/resources/licensing-town-by-town-2015 (last visited Apr. 29, 2015)	20-21
Massachusetts – State & County QuickFacts, http://quickfacts.census.gov/qfd/states/25000.html (last visited Apr. 29, 2015)	20
Nassau County, New York – State & County Quickfacts, http://quickfacts.census.gov/qfd/states/36/36059.html (last visited Apr. 29, 2015)	16
Revised Permit Map, http://www.nyfirearms.com/forums/pistol-permits/6709-revised-permit-map.html (last visited Apr. 29, 2015)...	22
Table PL-P2C NYC, http://www.nyc.gov/html/dcp/pdf/census/census2010/t_pl_p2c_nyc.pdf (last visited Apr. 29, 2015).....	17

IDENTITY AND INTEREST OF THE *AMICI*¹

The *Amici* are all organizations that represent the interests of lawful gun owners in Maryland, Massachusetts, New Jersey, and New York – States that, like the State of California, condition the issuance of licenses to carry handguns on discretionary standards. The manner in which officials implement these standards vary widely between and within these States, and this Court’s decision will likely have substantial ramifications for the *Amici*’s membership.

Amicus New York State Rifle & Pistol Association, Inc. (“NYSRPA”) is a non-profit member organization first organized in 1871 in New York City. NYSRPA is the oldest firearms advocacy organization in the United States, and it is the largest firearms organization in the State of New York. NYSRPA provides education and training in the safe and proper use of firearms, promotes the shooting sports, and supports the right to keep and bear arms through both legislative and legal action.

¹ Pursuant to Fed. R. App. P. 29(c)(5), *Amici* affirm that no party’s counsel has authored this brief in whole or in part, nor has any party or its counsel provided any money to fund this brief. No person other than the *Amici* and their members have contributed money towards the preparation of this brief. All parties have consented to the filing of this *Amici Curiae* brief.

Amicus Association of New Jersey Rifle & Pistol Clubs, Inc. (“ANJRPC”) is a non-profit membership corporation organized in 1936 to represent the interests of target shooters, hunters, competitors, outdoors people, and other lawful firearms owners in New Jersey. ANJRPC seeks to aid such persons in every way within its power, and to support and defend the people’s right to keep and bear arms, including the right of its members and the public to purchase, possess, and carry firearms. ANJRPC is the largest New Jersey organization dedicated to the shooting sports and the right to keep and bear arms.

Amicus Commonwealth Second Amendment, Inc. (“Comm2A”) is a Massachusetts non-profit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted *amicus curiae* briefs to the Supreme Court and to State supreme courts, and it has also sponsored litigation to vindicate the rights of law-abiding Massachusetts gun owners. Comm2A receives and responds to many queries from the public regarding firearms laws

and licensing in Massachusetts, and particularly, regarding the implementation of the discretionary standards that govern licenses to carry handguns.

Amicus Gun Owners' Action League ("GOAL"), formed in 1974, is an association of Massachusetts residents dedicated to promoting the right to keep and bear arms for competition, recreation, and self-defense. GOAL sponsors and develops programs that shooting competitors, sportsmen, recreational shooters, and law enforcement throughout the Commonwealth support. GOAL educates gun owners, voters, and the general public about Massachusetts gun laws and works toward the reform and improvement of these laws legislatively and through the courts.

Finally, *Amicus* Maryland State Rifle & Pistol Association, Inc. ("MSRPA") is dedicated to promoting safe and responsible marksmanship, competition, and hunter safety throughout Maryland, as well as to promoting the safe and responsible use of guns for self-defense. MSRPA seeks to educate citizens about responsible firearm ownership. MSRPA also advocates on behalf of its members, which include both firearm owners and firearm and marksmanship clubs.

ARGUMENT

Aside from California, five other States and the District of Columbia condition the right to bear arms on officials' determinations that individuals have adequate "need," "cause," or "reason."

Historically, discretionary gun licensing laws allowed officials to selectively prohibit disfavored racial groups from bearing arms. Today's discretionary laws, adopted in the twentieth century, allow officials to selectively grant or deny licenses based on their assessment of individual citizens' need to exercise their constitutional right.

Although many of the statutes use similar language, the extent to which discretionary laws actually prevent individuals from bearing arms varies widely between, and sometimes within, jurisdictions. In Hawaii, the discretionary system is a *de facto* ban. In Maryland, New Jersey, and some Massachusetts and New York localities, people obtain licenses only rarely, while in other Massachusetts and New York localities, officials issue licenses to all or almost all qualified applicants. This creates arbitrary results where individuals living on opposite sides of the street, otherwise indistinguishable, may have completely different chances of obtaining a license to carry a handgun.

Restrictive licensing policies strip most citizens of their right to bear arms. But armed self-defense is a civil right, and making the right available only *after* the need for its use has occurred is tantamount to denying the right altogether.

I) The History of Discretionary Licensing Laws

A. Nineteenth Century

The earliest weapon-licensing requirements in America date to the first part of the nineteenth century, when States sought to restrict the ability of free African Americans to use and carry arms. See Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 Kan. J. L. & Pub. Pol. 17, 18 (1995). During this period, Kentucky, Maryland, North Carolina, and Virginia all adopted laws that required black people, but not white people, to obtain licenses in order to use weapons. See id. at 18-20. This trend only intensified during Reconstruction, and “Black Codes” frequently included provisions that restricted the possession and use of arms by (*inter alia*) requiring people to obtain licenses. See id. at 20; see also Stephen P. Halbrook, *Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* 12-13, 40-41, 131 (2010); Robert J. Cottrol and Raymond T. Diamond, “Never Intended to Be Applied to the White Population”: Firearms Regulation and Racial

Disparity—the Redeemed South’s Legacy to a National Jurisprudence?, 70 Chi.-Kent L. Rev. 1307, 1324-25, 1328-29 (1995). The Fourteenth Amendment’s requirement that gun laws be facially neutral merely “led to the adoption of restrictive firearms laws in the South that were equal in the letter of the law, but unequally enforced.” Cramer, supra, at 20.

So pointed was the situation that Justices on at least two State supreme courts questioned the legitimacy of decisions that upheld these restrictions. One Justice of the Supreme Court of Ohio dissented from a 1920 decision that upheld a conviction for carrying a concealed weapon, reasoning that “[t]he southern states have very largely furnished the precedents,” which reflected “a decisive purpose to entirely disarm the negro, and this policy is evident upon reading the opinions.” State v. Nieto, 130 N.E. 663, 669, 101 Ohio St. 409, 430 (1920) (Wanamaker, J., dissenting). In 1941, a Justice of the Florida Supreme Court concurred in a decision that overturned a conviction for carrying a gun without a license, reasoning that “[t]he Act was passed for the purpose of disarming the negro laborers” and “was never intended to be applied to the white population and in practice has never been so applied.”

Watson v. Stone, 4 So. 2d 700, 703, 148 Fla. 516, 524 (1941) (Buford, J., concurring).

B. Twentieth Century

Although several States adopted discretionary standards for the issuance of licenses to conceal guns, in 1906 Massachusetts became the first state to condition the ability to carry any handgun in any manner on a “license to carry” that authorities had authority to withhold. The basic framework of the 1906 licensing standard remains in force today: a designated local official “may, upon the application of any person, issue a license . . . if it appears that the applicant has good reason to fear injury to his person or property, and that he is a suitable person to be so licensed.” 1906 Mass. Acts. ch. 172, § 1; see also Mass. Gen. Laws ch. 140, § 131(d). In the absence of a license, it was illegal to “carr[y] on [one’s] person a loaded pistol or revolver,” a prohibition so broad that (until 1957) it applied even within one’s own home. See 1906 Mass. Acts ch. 172, § 2; see also Commonwealth v. Seay 383 N.E.2d 828, 832 n.5, 376 Mass. 735, 741 n.5 (1978). In 1998, the General Court made it illegal to “possess” a handgun without a “license to carry,” which

effectively re-instituted the restriction in place from 1906 through 1957. See 1998 Mass. Acts ch. 180, § 29, sec. 129B(6).

New York followed Massachusetts 5 years later, adopting the “Sullivan Law” in 1911 and making it illegal to be in “possession” of a handgun “without a written license therefor.” 1911 N.Y. Laws ch. 195, sec. 1, § 1897. The original Sullivan Law wholly delegated licensing standards to localities by using language that authorized the issuance of licenses “in such manner as may be prescribed by ordinance.” See id. A 1913 amendment added the basic standard that remains in force today: licenses “to have and possess . . . in [a] dwelling” would be issued to “householders” of “good moral character” and for whom “no other good cause exists for . . . denial,” but people could only obtain licenses “to have and carry concealed” if local officials found “that proper cause exists for the issuance thereof.” 1913 N.Y. Laws ch. 608, sec. 1, § 1897; see also N.Y. Penal Law § 400.00(2)(a), (f). Then, as now, there was no license that authorized individual citizens to carry guns in open view, reflecting the apparent legislative determination that guns, if carried, should be carried in private.

It seems clear that antipathy towards African-Americans was not a significant part in New York's adoption of the Sullivan Act. However, there are indications that antipathy towards immigrant populations in New York City partially motivated the Sullivan Law and animated its enforcement during early years. See David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? 342-43 (1992); Cottrol & Diamond, supra, at 1333-34.

Although they currently have some of the most restrictive policies in the country, both Maryland and New Jersey did not require a discretionary license to carry guns in any manner (rather than just in a concealed manner) until relatively recent times. New Jersey adopted a "good cause" standard in 1922, which it changed to "need" in 1924, but people remained free to carry guns in open view. See 1924 N.J. Acts ch. 137, § 2; 1922 N.J. Acts ch. 138, § 1; see also State v. Gratz, 92 A. 88, 89, 86 N.J.L. 482, 483 (1914). It was not until 1966 that the New Jersey legislature expanded the law to ban all forms of carry without a license. See 1966 N.J. Laws ch. 60, sec. 32, § 2A:151-41(a); see also State v. Hock, 257 A.2d 699, 700, 54 N.J. 526, 529 (1969). Maryland, in turn,

prohibited carry in any form without a discretionary license in 1972. See 1972 Md. Laws ch. 13, § 3, sec. 36B(b); see also Smith v. State, 308 A.2d 442, 445 n.2, 18 Md. App. 612, 616 n.2 (Ct. Spec. App. 1973) (noting legislative change). The statutory standard was (and is) “good and substantial reason,” which had previously governed the issuance of licenses to carry concealed guns. See 1972 Md. Laws ch. 13, § 3, sec. 36E(a)(6).

Finally, while the *Amici* do not directly represent interests in Hawaii and the District of Columbia, the history of both jurisdictions’ discretionary laws merits brief discussion. Hawaii prohibited the carry of handguns in the absence of a discretionary license, and made that license subject to an official’s determination that an applicant had “good reason to fear an injury to his person or property, or . . . any other proper reason,” in 1927, before statehood. See 1927 Haw. Sess. Laws 209-10, §§ 5, 7. The District of Columbia adopted a discretionary licensing law only very recently, on October 9, 2014, following a District Court’s decision invalidating its general prohibition on carrying guns. See 2014 D.C. Act 447, § 2 (eff. Oct. 9, 2014); see also Palmer v. District of Columbia, no. 1:09-CV-1482, 2014 U.S. Dist. LEXIS 101945 (D.D.C.

Jul. 24, 2014). Although the D.C. Code had previously included a provision authorizing police officials to issue licenses to carry handguns, see D.C. Code § 22-4506 (repealed 2009), this provision was basically meaningless because District law otherwise prohibited the possession of handguns, see District of Columbia v. Heller, 554 U.S. 570, 574-75 (2008).

II) Current Implementation

A. Nationwide

At the present time, six States – California, Hawaii, Maryland, Massachusetts, New Jersey, and New York – and the District of Columbia condition the issuance of licenses to carry handguns on discretionary determinations. See Cal. Penal Code § 26150(a)(2); Haw. Rev. Stat. § 134-9(a); Mass. Gen. Laws ch. 140, § 131(d); Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii); N.J. Stat. Ann. § 2C:58-4(c), (d); N.Y. Penal Law § 400.00(2)(f); see also 2014 D.C. Act 926, § 2, sec. 910(a)(1)(A) (eff. Mar. 7, 2015).² However, the actual issuance practices of these

² Delaware has a discretionary “may or may not” standard, but this applies only to licenses to carry concealed handguns. 11 Del. Code Ann. § 1441(d). Delaware law allows people to carry guns in open view without licenses. See In re McIntyre, 552 A.2d 500, 501 n.1 (Del. Super. Ct. 1988). In addition, the States of Connecticut and Rhode Island have “hybrid” systems that incorporate both discretionary and non-

discretionary jurisdictions vary widely – ranging from a *de facto* ban to a presumptive practice of issuing licenses to all qualified applicants.

Although it does not cover all States and contains some inaccuracies, one noteworthy resource is a 2012 report of the General Accounting Office on concealed carry licensing throughout the United States. See U.S. Gen. Accounting Office, *States’ Laws and Requirements for Concealed Carry Permits Vary Across Nation* (2012).

The nationwide percentage of adults with licenses is unknown, but the GAO concluded that a total of 7.8 million licenses were in force in 44 States with a combined population of 205.7 million (although there may be some degree of double-counting). See U.S. Gen. Accounting Office, *supra*, at 1 & n.3.³ This equates with an overall licensure rate of approximately 3.8%.

discretionary elements – but which afford individuals with the ultimate ability to obtain licenses on a non-discretionary basis. See Conn. Gen. Stat. § 29-28(b) (officials “may” issue licenses); id. § 29-32b(b) (state review board “shall” order issuance of a denied license unless it finds “just and proper cause” for denial); R.I. Gen. Laws § 11-47-11(a) (local officials “shall” issue permits if requirements met); id. § 11-47-18(a) (attorney general “may” issue permits “upon a proper showing of need”); see also *Mosby v. Devine*, 851 A.2d 1031, 1047-48 (R.I. 2004).

³ Based on a population of 308,745,538, as reported in the 2010 Census. See Apportionment Data, <http://www.census.gov/2010census/data/apportionment-data.php> (last visited Apr. 29, 2015).

B. Hawaii: Virtual Ban

Hawaii law allows for the issuance of a license only “[i]n an exceptional case, when an applicant shows reason to fear injury to fear injury to the applicant’s person or property. . . .” Haw. Rev. Stat. § 134-9(a). However, this statutory grant is largely illusory, as there are normally *no* licenses in force anywhere in the State. Officials denied the applications of 44 of the 45 private citizens who submitted them during the five-year period from 2010 through 2014, and indeed, there were no licenses in force at the time of the 2012 General Accounting Office report. See U.S. Gen. Accounting Office, *supra*, at 75; Department of the Attorney General, Firearms Registrations in Hawaii, 2014 8 (2015); Department of the Attorney General, Firearms Registrations in Hawaii, 2013 11 (2014); Department of the Attorney General, Firearms Registrations in Hawaii, 2012 11 (2013); Department of the Attorney General, Firearms Registrations in Hawaii, 2011 7 (2012); Department of the Attorney General, Firearms Registrations in Hawaii, 2010 7 (2011).

C. Some Jurisdictions are Very Restrictive

The State of New Jersey has the most restrictive licensing regime in the continental United States. Both judicial precedents and

regulations direct licensing officials throughout the State to withhold licenses unless they find that an applicant has “urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant’s life that cannot be avoided by means other than by issuance of a permit to carry a handgun.” N.J. Admin. Code § 13:54-2.3(d)(1); see also In re Preis, 573 A.2d 148, 151-52, 118 N.J. 564, 570-71 (1990). For example, in one case a New Jersey appellate court concluded that fugitive recovery agents did not meet this standard in part because the dangers they faced arose out of their “voluntarily undertaken, private activities.” In re Borinsky, 830 A.2d 507, 517, 363 N.J. Super. 10, 26 (App. Div. 2003). In litigation, the State disclosed that it issued a total of 1,285 licenses during the years 2010 and 2011, which (given that each license has a duration of two years⁴) equates to an approximate licensure rate of

⁴ See N.J. Stat. Ann. § 2C:58-4(a).

0.019% among the adult population.⁵ See Supplemental Brief at 7, Drake v. Filko, No. 12-1150 (3d Cir. Apr. 29, 2013).⁶

Several New York localities are also very restrictive. New York State law conditions the issuance of licenses to carry handguns on “proper cause,” but neither the statute nor decisions of the State’s high court provide any positive definition for the term. See N.Y. Penal Law § 400.00(2)(a)(f); O’Brien v. Keegan, 663 N.E.2d 316, 317, 87 N.Y.2d 436, 440 (1996) (referring to “proper cause” as either a “need” or at least a “reason” for a license allowing the carry of firearms); see also Moore v. Gallup, 45 N.Y.S.2d 63, 267 A.D. 64 (App. Div. 1943) (“local authorities, having in view considerations of public safety and the maintenance of law and order in their community, shall ascertain whether ‘proper cause exists for the issuance’ of the desired license”), aff’d without op. 59 N.E.2d 439, 239 N.Y. 846 (1944).

⁵ Based on an adult population of 6,726,800, per the 2010 Census. See Age and Sex Composition, <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (last visited Apr. 29, 2015).

⁶ While the GAO report contains a significantly higher number (32,000), this appears to include retired law enforcement licenses, who apply under a separate, non-discretionary scheme. The documentation submitted to the Third Circuit addressed only private citizen licenses. See GAO report, supra, at 76; see also N.J. Stat. Ann. § 2C:39-6(l).

Nassau County officials recently reported that after an audit, only 19 people (other than retired law enforcement officers) held “full carry” (unrestricted) licenses. See Sandra Peddie, Nassau gun permits were improperly issued in some cases, Newsday (Apr. 5, 2014). 19 licenses represent about 0.005% of the adult population of Nassau County.⁷

New York City also has a very restrictive approach. The City’s interpretation, formally adopted in a 1991 regulation and previously used in litigation, defines “proper cause” as “[e]xposure . . . to extraordinary personal danger” either “by reason of employment or business necessity,” or else “by proof of recurrent threats to life or safety.” N.Y. City R. tit. 38, § 5-03(a)-(b); see also Klenosky v. N.Y. City Police Dep’t, 428 N.Y.S.2d 256, 257, 75 A.D.2d 793, 793 (App. Div. 1980), aff’d without op. 421 N.E.2d 503, 53 N.Y.2d 685 (1981). The result is a licensure rate that, while higher than New Jersey’s, is still very low. A 2008 New York Times article, relying on information provided by the New York City Police Department, reported that 2,291 New York City residents held “full carry” handgun licenses – which

⁷ Based on a population of 1,358,627. See Nassau County, New York – State & County Quickfacts, <http://quickfacts.census.gov/qfd/states/36/36059.html> (last visited Apr. 29, 2015).

equates to about 0.036% of the City’s adult population.⁸ See Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. Times (Dec. 2, 2008). Moreover, while practices vary significantly between different counties (an issue reached soon), officials in some other New York counties have relied on this same restrictive standard to deny licenses sought for self-protection. See *Bando v. Sullivan*, 735 N.Y.S.2d 660, 662, 290 A.D.2d 691, 693 (App. Div. 2002); *In re Bastiani*, 881 N.Y.S.2d 591, 592, 23 Misc. 3d 235, 236 (County Ct., Rockland Co. 2008); *In re O’Connor*, 585 N.Y.S.2d 1000, 1003, 154 Misc. 2d 694, 697 (County Ct., Westchester Co. 1992) (citing N.Y. City R. tit. 38, § 5-03) *aff’d sub nom.*, *O’Connor v. Scarpino*, 638 N.E.2d 950, 83 N.Y.2d 919 (1994).

In Maryland, State law provides that there is no “good and substantial reason” unless an applicant faces “apprehended danger” that is evidenced by specific, documented threats. See *Snowden v. Handgun Permit Review Bd.*, 413 A.2d 295, 297-98, 45 Md. App. 464, 469-70 (Ct. Spec. App. 1980); accord *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137, 1148-49, 163 Md. App. 417, 437-38 (Ct. Spec. App.

⁸ Based on 2010 Census numbers. See Table PL-P2C NYC, http://www.nyc.gov/html/dcp/pdf/census/census2010/t_pl_p2c_nyc.pdf (last visited Apr. 29, 2015).

2005). Regulations provide that the Handgun Permit Review Board should consider an individual's occupation, his or her "reasons" for requesting a permit, and "[w]hether the permit is necessary as a reasonable precaution for the applicant against apprehended danger." Md. Code Regs. 29.03.02.03. According to the GAO, about 12,000 people, or 0.28% of the State's adult population, held permits to carry handguns in Maryland in 2011. See U.S. Gen. Accounting Office, supra, at 75. And while this is higher than in Nassau County, New York City, and New Jersey, it is still much lower than the licensure rates in neighboring States. The percentage of licensed adults in Connecticut, Pennsylvania, and Virginia are 6.2%, 8.3%, and 4.7%, respectively. See id. at 75-76.

D. Other Localities Have an *Ad Hoc* Range of Practices

The practices for issuing (or denying) carry licenses in Massachusetts and New York grow out of the fact that these States, in contrast to other discretionary States, require licenses to merely possess. Moreover, both States lack any positive definition for "reason" or "cause," and their courts have held that local officials can "restrict" licenses to specified purposes, such as "hunting and target shooting."

See O'Connor v. Scarpino, 638 N.E.2d 950, 951, 83 N.Y.2d 919, 921 (1994); Ruggiero v. Police Commissioner of Boston, 464 N.E.2d 104, 107, 18 Mass. App. Ct. 256, 260 (App. Ct. 1984). The Massachusetts General Court has since amended the statute to expressly authorize this practice. See 1998 Mass. Acts ch. 180, § 41, sec. 131(a)-(b). Thus, whether an individual living in one of these States can obtain a carry license will depend on the essentially arbitrary consideration of whether a local official considers it appropriate to issue “unrestricted” licenses. In both states, an unrestricted license allows the carry of a gun in public, while a restricted one generally does not. See generally O'Brien, 663 N.E.2d at 317-18, 87 N.Y.2d at 440; Ruggiero, 464 N.E.2d at 108, 18 Mass. App. Ct. at 261.

The manner in which officials issue licenses, and the rate at which they impose restrictions, varies *widely* across both States. In Massachusetts, 343 police chiefs⁹ issued 57,408 handgun licenses to Massachusetts residents during the year 2014, according to information that *Amicus* Comm2A obtained by means of a freedom-of-

⁹ Massachusetts law designates each police chief as the “licensing authority” for his or her jurisdiction. See Mass. Gen. Laws ch. 140, § 121.

information request and posted on its website. See Licensing Town-by-Town 2015, <http://www.comm2a.org/index.php/resources/licensing-town-by-town-2015> (last visited Apr. 29, 2015). As of January 2015, there were a total of 315,137 handgun licenses in force, and 289,321 of them (91.8%) were unrestricted. This gives Massachusetts an overall carry license rate of about 4.3%.¹⁰

But although a significant number Massachusetts residents have been able to obtain unrestricted licenses, many others live in localities that make it difficult or impossible for citizens to exercise their right of armed self-defense. For example, the police chief in the small Berkshire town of Adams restricted 109 of the 125 licenses he issued during the year 2014 (87%), while his neighboring chiefs in Cheshire, Florida, North Adams, and Windsor restricted none of the 317 licenses they issued, and the chief in neighboring Lanseborough imposed restrictions on only 4 of 78 licenses (5%).

Moving east to the Boston area, the chief in Watertown restricted 76 of 99 licenses (77%), while the neighboring chief in Natick restricted

¹⁰ Based on a 2014 population of 6,745,408. See Massachusetts – State & County QuickFacts, <http://quickfacts.census.gov/qfd/states/25000.html> (last visited Apr. 29, 2015).

none of 235 licenses, and the neighboring chief in Concord restricted only 1 of 97 licenses (1%). Other neighbors restricted more. The Newton chief restricted 96 of 203 licenses (45%), and the chief in Cambridge restricted 66 of 167 (40%). Another locality with a high restriction rate was Lowell, where the chief restricted 284 of 399 licenses (71%). Neighboring chiefs again deemed their citizens more worthy of exercising their rights. The chief in Tewksbury issued all 413 licenses without restrictions, and the chief in Chelmsford imposed restrictions on only 2 of 262 licenses (1%). Billerica and Dracut, the other neighbors, imposed restrictions 32 of 470 licenses (7%) and on 132 of 316 licenses (42%), respectively.

In the State of New York, there is no official source for either the number of licenses or the rate at which local judges¹¹ impose restrictions. See U.S. Gen. Accounting Office, supra, at 77 n.d. However, one online New York firearms group has compiled and categorized the issuance policies of all of the state's counties. See Revised Permit Map, <http://www.nyfirearms.com/forums/pistol->

¹¹ New York law makes local county judges the “licensing officers” in most of the state, but designates police officials in Nassau County, New York City, and some parts of Suffolk County. See N.Y. Penal Law § 265.00(10).

[permits/6709-revised-permit-map.html](#) (last visited Apr. 29, 2015).¹²

Numerically, 27 counties (nearly half) are coded “green,” meaning that authorities there generally issue unrestricted licenses to private citizens who request them and meet reasonable requirements.¹³ Twelve counties, including the five counties of New York City, fall at the other extreme and are “red,” meaning that authorities there almost never issue unrestricted licenses to private citizens.¹⁴ The 23 remaining counties have policies that fall between these extremes.¹⁵ See also David D. Jensen, The Sullivan Law at 100: A Century of “Proper Cause” Licensing in New York State, 14 NYSBA Gov., L. & Pol’y J. 6, 9-10 (2012).

This *ad hoc* assemblage of practices leads to arbitrary results. For example, a person living on the north side of the line between Putnam

¹² Counsel participated in the preparation of this information.

¹³ The counties are Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Chenango, Columbia, Cortland, Delaware, Dutchess, Essex, Franklin, Hamilton, Livingston, Monroe, Niagara, Ontario, Orleans, Ostego, Putnam, Schoharie, Schulyer, Steuben, Sullivan, Wayne, Wyoming, and Yates.

¹⁴ Aside from New York City, the counties are Genesee, Nassau, Rockland, Saratoga, Suffolk, Tompkins, and Westchester.

¹⁵ The counties are Albany, Cayuga, Clinton, Erie, Fulton, Greene, Herkimer, Jefferson, Lewis, Madison, Montgomery, Onondaga, Oneida, Orange, Oswego, Rensselaer, Schenectady, Seneca, St. Lawrence, Tioga, Ulster, Warren, and Washington.

and Westchester Counties (in New York) will likely be able to obtain an unrestricted license, while a neighbor living immediately to the south of that line likely will not. Likewise, a person will likely be able to obtain an unrestricted license if he or she lives in Tewksbury (Massachusetts), but not if he or she lives yards away in Lowell.

CONCLUSION

Need-, cause-, and reason-based discretionary standards create arbitrary and untenable results, for the real issue under the standard is often not an individual's objective need for self-defense, but rather, a decision-maker's subjective opinion about the veracity of armed self-defense. But there is no good or sound reason for concluding the "interest in preventing misuse or accidental use of handguns is furthered by limiting possession to those who can show a greater need for self-defense than the typical citizen," and indeed, "it seems odd to suggest that one who obtains a handgun carry permit because he is in imminent danger is less likely to handle a gun than one who obtains a carry permit because he might want to exercise that right in the future even though he perceives no present danger." Drake v. Filko, 724 F.3d 426, 453-54 (3d Cir. 2013) (Hardiman, J., dissenting). Rather than

serving to regulate the exercise of a constitutional right in a manner that advances public safety, need-based discretionary systems serve as “a rationing system” that seek “simply to reduce the total number of firearms carried outside of the home.” Woollard v. Sheridan, 863 F. Supp. 2d 462, 474 (D. Md. 2012), rev’d sub nom. Wollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

The judgment of the District Court should be reversed.

Dated: April 30, 2015

s/ David D. Jensen
David D. Jensen
DAVID JENSEN PLLC
111 John Street, Suite 420
New York, New York 10038
(212) 380-6615 tel
(917) 591-1318 fax
david@djensenpllc.com
Attorney for Amici Curiae

**Form 6. Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 4,773 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using (*state name and version of word processing program*) Microsoft Word 2010
(*state font size and name of type style*) Size 14 Century Schoolbook, *or*

this brief has been prepared in a monospaced spaced typeface using (*state name and version of word processing program*) _____
with (*state number of characters per inch and name of type style*) _____

Signature

Attorney for

Date

9th Circuit Case Number(s) 10-56971, 11-16255

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > PDF Printer/Creator).

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) April 30, 2015 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ David D. Jensen

CERTIFICATE OF SERVICE

When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system

on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)